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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 591

COOPERATIVE TRANSIT COMPANY, COOPERATIVE BUS COMPANY, AND THE COOPERATIVE BUS COMPANY, CORPORATIONS,

Petitioners,

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 591

COOPERATIVE TRANSIT COMPANY, COOPERATIVE BUS COMPANY, AND THE COOPERATIVE BUS COMPANY, EACH A CORPORATION,

Petitioners,

vs.

STATE ROAD COMMISSION OF WEST VIRGINIA.

PETITION.

The petitioners, Cooperative Transit Company, Cooperative Bus Company, and The Cooperative Bus Company, each a corporation, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia, entered in the above cause on the thirtieth day of August, 1943, refusing a rehearing of an order (dated July 20, 1943) refusing a writ of prohibition to the State Road Commission of West Virginia (R. 14).

Opinion Below.

The Supreme Court of Appeals of West Virginia wrote no opinion.

Jurisdiction.

The order refusing rehearing was entered by the Supreme Court of Appeals of West Virginia, on the thirtieth day of August, 1943 (R. 14). The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347 (a)). Time for filing this Certiorari was extended to January 29, 1944, by order of this Court, dated November 15, 1943 (R. 20).

Questions Presented.

1. Whether the State of West Virginia in the absence of Congressional action has jurisdiction in view of the Commerce Clause of the Constitution (Constitution, Art. 1, Sec. 8) to control the rates of toll of interstate bridges over the Ohio River, separating the States of West Virginia and Ohio, and physically in both states.

2. Whether or not the State Road Commission of West Virginia has jurisdiction to fix tolls for the stream of vehicular traffic originating in the State of Ohio and terminating in the State of West Virginia, and originating in West Virginia and terminating in the State of Ohio, after crossing the Ohio River between Bridgeport, Ohio, and Wheeling, West Virginia, on traffic bridges erected over the Ohio River at that point, the west shore of said river at low water mark being the boundary between the two states, or whether the exclusive jurisdiction of tolls over these interstate bridges is vested in the Secretary of War of the United States by virtue of the General Bridge Act of 1906, 34 Stat. 85 § 494; 33 U. S. C. (33 U. S. C. A. § 494) and its two amendments (1930), 46 U. S. Stat. at L. 82 (33 U. S. C. A. § 498 b) (1935) c. 597 § 2, et seq., 49 Stat. 671 (33 U. S. C. A. 504).

3. Whether or not the exclusive Federal jurisdiction is conceded by the Legislature of West Virginia, by virtue

of the fact that the Legislative Act, under which the State Road Commission purported to act, recognizes the supremacy of the Federal Government in relation to tolls, Chap. 17, Art. 17, Section 22, Code of West Virginia, Michie Serial § 1681.

4. Whether the rates of toll of the petitioner, Cooperative Transit Company, are within the jurisdiction of the Interstate Commerce Commission, since three of the four bridges (constituting two complete spans of bridges) from the State of West Virginia to the State of Ohio are railroad bridges within the statutory definition of the Interstate Commerce Act, 49 U. S. C. A. § 1, Paragraph 1 (a) and Paragraph 3.

5. Whether or not the refusal of prohibition by the Supreme Court of Appeals of the State of West Virginia, directed to the State Road Commission of West Virginia, forbidding its exercise of jurisdiction over the tolls of the bridges in question is a deprivation of a right in petitioners to have the tolls set in the manner and form provided by Congress of the United States derived from the Commerce Clause of the Constitution, forbidding direct control of interstate commerce by a state, and declared in the General Bridge Act of 1906 and its amendments (and as to railroad bridges in the Interstate Commerce Act); and, in consequence, is a denial of the equal protection of the laws, and a deprivation of property of petitioners without due process of law, within the meaning of Section I of Article XIV of the Amendments to the Constitution of the United States.

Statutes Involved.

1. The General Bridge Act of 1906 entitled "An Act to Regulate Construction of Bridges over Navigable Waters" approved March 23, 1906 (§ 4), 34 Stat. 85, § 494, T. 33 U. S. C. (33 U. S. C. A. § 494).

2. The amendment to the General Bridge Act of 1930 (Act June 27, 1930, 46 U. S. Stat. at L. 82, 33 U. S. C. A. § 498 b) extending the act to the regulation of toll of certain bridges.

3. Act of December 17, 1872 (17 U. S. Stat. at L. 398 and § 7 3d).

4. Act of February 14, 1883 (22 U. S. Stat. at L. 414 and § 5 thereof).

(These Acts in part specify the bridges to which the amendment of 1930 applies.)

5. The Amendment to the General Bridge Act of 1935 (Act August 21, 1935, C. 597, § 2, et seq., 49 Stat. 671, 33 U. S. C. A. 504) extends the jurisdiction of the General Bridge Act of 1906 to tolls over *any* bridge over any of the navigable waters of the United States when used in interstate commerce (with exceptions not pertinent).

6. Commerce Clause of the United States of America (Const. Art. 1, Sec. 8).

7. Act West Virginia Legislature (Official West Virginia Code, Chapter 17, Article 17, Section 22, serial § 1681), West Virginia, under which the State Road Commission purported to act, which recognizes the supremacy of Federal law in regulating the rates of bridges.

Article 8, Section 3, Constitution of West Virginia; Chapter 51, Art. 1, Sec. 3, Official Code of West Virginia; giving to the Supreme Court of Appeals of West Virginia original jurisdiction in prohibition.

Interstate Commerce Act, 49 U. S. C. A. § 1, paragraph 1 (a) and paragraph 3.

Statement.

Two complete bridge systems span the Ohio River between Wheeling, West Virginia and the State of Ohio.

Two sections of these bridges span the waters between the east or West Virginia shore of the Ohio River and Wheeling Island in the River (a part of West Virginia), and two of these bridges connect said Island and the Ohio or Western shore. The bridges are partly in the State of West Virginia and partly in the State of Ohio (R. 2). The Island is in West Virginia, and is a part of the City of Wheeling. The Ohio River is navigable. Thus one section of each bridge system extends from West Virginia to the Island and another section from said island to the State of Ohio, both sections constituting an interstate bridge over the Ohio River. Four bridges, therefore, constitute the two complete bridge systems, each consisting of two spans.

Three of the bridges or spans carry the tracks of one of the petitioners—the Cooperative Transit Company—an interurban electric car line—which, with its two subsidiary bus companies (also petitioners), are employee-owned and operated and engaged in interstate commerce and carry mail as well as passengers (R. 4, 12). The use of these bridges to petitioners is vital and necessary to their interstate traffic. The Transit Company owns the tracks on one of the bridges and all of the overhead special facilities upon all of the bridges used by them and maintains a five-cent fare for transit to and from the states of West Virginia and Ohio (R. 12). The Transit Company is obliged to operate its schedules pursuant to the requirements of the Interstate Commerce Commission (R. 4).

Cooperative Bus Company and The Cooperative Bus Company operate buses over said bridges in interstate commerce and in pursuance of the regulations of the Interstate Commerce Commission (R. 4).

The City of Wheeling bought these bridges March 26, 1941 (R. 4). The City claimed the absolute power to fix rates of toll from the State of Ohio into West Virginia and the reverse over these bridges without let or hin-

drance or responsibility to any regulating body; the City immediately freed the bridges or spans connecting the City of Wheeling and the Island of all tolls and transferred the tolls to the bridges connecting the Island and the Ohio shore, increasing the tolls collected at the Ohio-West Virginia boundary (of all traffic from Ohio into West Virginia and from West Virginia into Ohio) to pay for the maintenance and purchase of all four bridges and not alone those which merely connected the Island and the Ohio shore. The effect of this was to make the traffic between the City of Wheeling and the Island free of tolls and to compel those obliged to use the other two bridges or spans connecting the Island and the State of Ohio, and coming from Ohio to West Virginia, or going from West Virginia to the State of Ohio, to pay for all four bridges or spans (R. 4).

The Public Service Commission of West Virginia and the Supreme Court of Appeals of West Virginia (see *Village of Bridgeport* v. *The City of Wheeling, et al.* (1943) — W. Va. —, 24 S. E. (2d) 285) refused to confirm the power of the City to fix and regulate tolls over the bridge.

The City on March 26, 1943, in a new proceeding, by petition, then requested the Public Service Commission of West Virginia to regulate its tolls (R. 7). In this proceeding the petitioners appeared specially and objected to the jurisdiction of the Public Service Commission of West Virginia (R. 3).

The Public Service Commission ignored the objections and, by an order dated May 5, 1943, fixed rates of toll on all traffic whether moving from the State of Ohio into West Virginia or the reverse, that is, from the State of West Virginia into Ohio, over only the two bridges or spans between the Island and the Ohio shore, but authorizing tolls to be collected sufficient in amount to maintain and

pay for all four bridges or spans and, in so doing, destroyed long-existing classifications of traffic and increasing petitioners' tolls one hundred and fifty (150) per cent (R. 7).

Petitioners asked for suspension and review and petitioned for a writ of prohibition in the Supreme Court of Appeals of West Virginia, pending which the State of West Virginia purchased the bridges and the State Road Commission of West Virginia assumed control of all four bridges and asserted a right to fix and regulate tolls by its own exclusive and unregulated authority, acting under an Act of the Legislature of West Virginia, which provided that all tolls should be subject

> "* * * to any applicable law or regulation of the United States of America now in force or hereafter to be enacted or made * * *" (Official W. Va. Code, Chap. 17, Art. 17, Sec. 22, Serial § 1681) (R. 8).

The State Road Commission announced its intention of maintaining the same rates of toll on the two bridges or spans connecting the Island and the State of Ohio, which the Public Service Commission had set upon the petition of the City of Wheeling (R. 3).

Petitioners thereupon petitioned the Supreme Court of Appeals of West Virginia for a writ of prohibition against the State Road Commission, based upon the lack of state authority to regulate tolls over interstate boundary bridges over navigable streams and the fact that exclusive authority is fixed in the Secretary of War to regulate tolls by the General Bridge Act of 1906 and its two amendments and pointing to the provisions of the Interstate Commerce Act providing for Federal jurisdiction over railroad bridges.

The Supreme Court of Appeals of West Virginia denied the Writ (R. 1) and refused a rehearing (R. 14) and this application followed.

The Supreme Court of Appeals of West Virginia wrote no opinion, but entered an order simply denying the writ of prohibition (R. 1) and refused a rehearing (R. 14). There is no prior written opinion, nor one in a companion case. In a separate case (*Village of Bridgeport* v. *City of Wheeling*) not reported, however, the Court in an order (copy of which is appended to the brief, p. 25) refusing the City of Wheeling suspension and review of an order of the Public Service Commission of West Virginia, in reference to a restoration of former rates over the same bridges, set out three grounds for its action, viz. (a) No specific legislation pertaining to the subject matter has been enacted by Congress. (b) No regulatory action has been taken by the Interstate Commerce Commission or Secretary of War. (c) The matters involved were merely local (R. 6).

Rulings of the Court Below.

The Supreme Court of Appeals of West Virginia, by a divided court, entered an order on July 20, 1943, refusing prohibition (R. 1) without opinion. Upon petition for rehearing (R. 14, 15, 16), petitioners invited a statement of reasons for refusing the prohibition, whether or not the papers were technically insufficient and setting up that it was a matter of substantive right for petitioners to know as to where jurisdiction lay. The Court denied rehearing and prohibition by an order entered August 30, 1943, without an opinion (R. 14).

Specification of Error to Be Urged.

The Supreme Court of Appeals of West Virginia erred in refusing the writ of prohibition for usurpation of authority, because the State Road Commission was without a shadow of power directly to control the rates of toll of the interstate boundary bridges in question in view of

(a) The Commerce Clause of the Constitution

(b) The General Bridge Act of 1906 and its 1930 and 1935 Amendments
(c) The Interstate Commerce Act.

Reasons for Granting the Writ.

There is here presented a question of conflict of jurisdiction concerning interstate commerce between the National Government on the one hand and the State of West Virginia on the other, of which the final arbiter must be this Court. Petitioners have completely exhausted their remedy in the West Virginia courts.

1. The Commerce Clause of the Constitution prevents any state imposing a direct control upon interstate commerce, whether or not the Congress has acted. The holding of the Supreme Court of Appeals of West Virginia is in direct conflict with the decision of this Court in *Covington v. Cincinnati Bridge Co.* (1893), 154 U. S. 204, which struck down an attempt of the State of Kentucky to regulate the rates of toll of a bridge over the Ohio River at Cincinnati between the States of Ohio and Kentucky.

2. The General Bridge Act of 1906 and its two amendments of 1930 and 1935 has not been specifically and directly construed by the Supreme Court of the United States, although the Circuit Court of Appeals for the District of Columbia in *Clarksburg-Columbus Short Route Bridge Co. v. Woodring* (1937), 89 Fed. (2d) 788 (Reversed on other grounds (1938) 302 U. S. 658), decided specifically that the control of rates of two bridges between the states of West Virginia and Ohio, over the Ohio River, was within the jurisdiction of the Secretary of War. There are numerous other cases where his jurisdiction has been recognized.

The stream of traffic which flows over the bridges in question is national and a part of the daily movement on the great arterial highway of Route 40 of the old National

Road and its laterals and feeders, both east and west of these bridges (R. 9). The imposition of rates by the West Virginia Road Commission directly affects the whole movement of traffic and particularly that of petitioners whose operations and fares are both as to its electric car and bus business controlled by the Interstate Commerce Commission. The necessity for coordination of the elements of interstate carriage of both fares to passengers and rates of toll over the bridges in one central authority is imperative.

3. The Act of West Virginia (Official Code of West Virginia, Chap. 17, Art. 17, Sec. 22, Ser. § 1681) under which the State Road Commission of West Virginia purported to act recognizes the paramount authority of the Congress of the United States.

4. The authority of the Secretary of War is either exclusive or it is non-existent.

5. As a practical matter, the underlying reasons for the constitutional surrender by the states of national control of instruments of interstate commerce to the National Government are clear-cut in the case of a bridge forming part of a great National Highway System (Route 40, or the National Pike) and especially so in the circumstance of the petitioners, whose rates are controlled by national authorities, through the Interstate Commerce Commission, constant confusion and aggravation would follow any concession of authority in the states to control part of the stream of transcontinental commerce.

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No. 591

COOPERATIVE TRANSIT COMPANY, COOPERATIVE BUS COMPANY, AND THE COOPERATIVE BUS COMPANY, CORPORATIONS,

Petitioners,

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions.

There is no opinion. An opinion in a collateral cause bearing on the questions involved, is printed as an appendix to this brief (App. p. 25).

Jurisdiction.

Jurisdiction is based upon Judicial Code, Section 240 (a) as amended by Act of February 13, 1925 (28 U. S. C. A. §348 (a)).

In view of the union of petition and brief a re-statement of the questions presented and of the specifications of error to be urged is here omitted and not presented a second time.

The Facts.

The essential facts are set out in the statement of Petition (p. 4) and are not repeated.

Argument.

Briefly the questions arise from the attempt of the State Road Commission to regulate the rates of toll upon two interstate bridges erected over the navigable Ohio River at Wheeling, West Virginia, and connecting the West Virginia and the Ohio shores. The petitioners asked for prohibition in the Supreme Court of Appeals of West Virginia, which was denied without opinion (R 1).

Petition for rehearing was likewise denied without opinion (R 14).

A toll bridge over a navigable stream is an instrumentality of commerce and the traffic over it is interstate commerce, *Overstreet* v. *North Shore Corporation*, (1943), 318 U. S. 125; *Shrader* v. *Traction Co.* (1919) 84 W. Va. 1, 99 S. E. 207. There can be no doubt that the setting of the rates of toll of these bridges is a direct control of part of the stream of interstate commerce, flowing by motor vehicle over a great national arterial highway (Route 40). Thus any question of the exercise by the State of West Virginia of its police powers in local matters is eliminated and as well the question of how far a state, in controlling interstate traffic, may indirectly affect interstate commerce. The safety of the public and the convenient use of the bridge is not involved. "Local problems" fall within a traditional category well beyond the periphery of the direct regulation involved here, *California* v. *Thompson* (1941), 313 U. S. 109, 61 Sup. Ct. 930. The action of the State Road Commission of West Virginia is direct action within that area of powers wholly and completely preempted by the National

Government by virtue of the Commerce Clause of the Constitution. The powers of the National Government are plenary and complete and without limitation other than are prescribed in the Constitution, so no state activity can thwart it. *U. S.* v. *Wrightwood Dairy Co.* (1942) 315 U. S. 110, 62 Sup. Ct. 523. Whether Congress has acted or not, the states are impotent to invade the area of direct control.

I.

The decision of the Supreme Court of Appeals of West Virginia is in direct violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8) by virtue of which the power of the Congress to regulate this Commerce is supreme and plenary and wholly withdrawn from the states. In the absence of action by Congress, the Constitution of its own force immunizes interstate commerce from the direct control of the states.

National exigencies require control of interstate commerce by a single authority. The fixing of an interstate rate is forbidden to a state. *Minnesota Rate Cases (Simpson* v. *Shepard)*, 230 U. S. 352, 32 L. Ed. 729. *Hanley* v. *Kansas City Ry.* (1903), 187 U. S. 617, 47 L. Ed. 333. The limits of authority of the states in relation to railroad carriers was settled in the Minnesota rate cases. No reason appears why a state should now control the rates of a different instrumentality of commerce. That area of authority permitted to states *indirectly* to affect interstate commerce, in the absence of Congressional action, has been rigidly confined to intra-state transactions, where a state exercises its police power within its own territorial limits. The direct control of interstate commerce by a state exercising its police power, even in the absence of action by Congress, has never been conceded. Nor has there ever been a suggestion that a state may, as here, reach beyond its borders and directly

regulate commerce originating and ending in another state, as well as that passing to and fro between two states. *Public Service Commission* v. *Attleboro* (1927), 273 U. S. 83, 47 Sup. Ct. 294.

In the instant case the bridges are physically located in two states with a navigable river between them. The control of bridge rates can easily mean the control in practical effect of all traffic moving over the bridges.

II.

The decision of the Supreme Court of Appeals of West Virginia conflicts with decisions of this court and other courts holding that a state has no power to regulate the tolls of interstate bridges over navigable streams.

Covington v. *Cincinnati Bridge Co.* (1893), 154 U. S. 204, 38 L. Ed. 962.

The Bridge Company was indicted for charging greater tolls than provided by Kentucky law. The power of the State of Kentucky to regulate the bridge over the Ohio between Covington, Kentucky, and Cincinnati, Ohio, was denied by this Court on appeal, holding that the bridge was an instrument of interstate commerce.

The courts of three sister states follow the Covington case.

Broadway and Newport Bridge Co. v. *Commonwealth* (1917), 173 Ky. 172. *City of Leavenworth* v. *Terminal Ry. Co.* (1929), 127 Kan. 474. *Burkburnett Bridge Co.* v. *Cobb* (1925), 108 Okla. 21. These three state courts having the specific question to decide held against the authority of a state to regulate the tolls of an interstate bridge over a navigable stream, on the authority of the *Covington* case.

III.

The Decision of the Supreme Court of Appeals of West Virginia conflicts with the General Bridge Act of 1906 and its 1930 and 1935 amendments, placing jurisdiction of toll bridges over navigable streams within the exclusive jurisdiction of the Secretary of War.

The General Bridge Act of 1906: Amendments of 1930 and 1935.

The General Bridge Act of 1906 entitled "An Act to regulate the construction of bridges over navigable waters" approved March 23, 1906 (§ 4), 34 Stat. 85, § 494 T, 33 U. S. C. A. (33 U. S. C. A. § 494) was designed to establish uniform regulations for the construction and operation of bridges over navigable streams.

In reference to tolls the pertinent provisions are:

> "If tolls shall be charged for the transit over any bridge constructed under the provisions of this chapter * * * such tolls shall be reasonable and just * * * and the Secretary of War may, at any time, and from time to time prescribe the reasonable rates of toll for such transit over such bridge * * *" (33 U. S. C. A. § 494) 34 Stat. 85.

From 1906 to 1930 the General Bridge Act applied only to the tolls of bridges constructed pursuant to its provisions, automatically excluding the regulation of tolls of bridges constructed prior to 1906.

The 1930 Amendment to the General Bridge Act.

In 1930 by amendment (Act, June 27, 1930) 46 U. S. Stat. at L. p. 82, 33 U. S. C. A. § 498 (b)), Congress extended the General Bridge Act, so far as regulation of tolls was concerned, to include previously authorized bridges where Congress had retained the right to alter, amend or repeal the Act authorizing the bridges.

The Act was entitled "An Act to provide for the regulation of tolls over certain bridges", Section 1, 46 Stat. 821 (498 b) providing:

> "Any bridge authorized, prior to March 23, 1906, by Act of Congress specifically reserving to Congress the right to alter, amend, or repeal such Act, shall, in respect of the regulation of all tolls, be subject to the provisions of the Act entitled 'An Act to regulate the construction of bridges over navigable waters', approved March 23, 1906."

Three of the four bridges whose tolls are involved were authorized under Acts of Congress each of which specifically reserved in Congress the right to alter, amend or repeal (R. 10). These Acts are:

1. December 17, 1872 (17 U. S. Stat. at L. 398) entitled "An Act to authorize the construction of bridges over the Ohio River and to provide the dimensions of the same". Section 7 thereof provided:

> "* * * *that the right to alter or amend this Act* * * * *is hereby expressly reserved.*"

2. February 14, 1883 (22 U. S. Stat. at L. 414) amended sections 2 and 4 of the foregoing Act of 1872 by providing for different structural specifications, and in Section 5 provided:

> "*That the right to alter, amend or repeal this Act, as set forth in Section 7 of the Act hereby amended, is hereby reserved.*"

Two of the bridges involved were built in the 1890s pursuant to the above Acts of 1872 and 1883, and the regulation of their tools came within the express language of the 1930 amendment to the General Bridge Act of 1906; one of the bridges was rebuilt in the 1890s (R. 7, 10).

The 1935 Amendment.

The General Bridge Act of 1906 and the first amending act of 1930 expressly took jurisdiction of tolls over all bridges authorized by Congress whether before or after the year 1906; the only requirement being as to those authorized previous to 1906 that Congress had retained the right to alter, amend and repeal in the authorizing act.

By the second amendment to the General Bridge Act of 1906 of August 21, 1935, (C. 597, sec. 2, et seq. 49 Stat. 671; 33 U. S. C. A. 503) it provided:

> "Tolls for passage or transit over *any* bridge over *any* of the navigable waters of the United States, if such bridge is used for purposes of travel or transportation in interstate or foreign commerce, shall be just and reasonable." (Italics ours.)

and placing jurisdiction in the Secretary of War (Sec. 504).

> "The Secretary of War is authorized, either upon complaint or upon his own initiative to conduct an inquiry at any time * * *"

This second amendment excepts from its operation the bridges coming under the 1906 Act and the 1930 Amendment, also intra-state bridges built under State Legislative authority over navigable streams and bridges whose tolls are prescribed by contract with a state, political subdivision or municipality.

The tolls of certain of the group of four bridges comes under the second amendment, one of which is the historic Suspension Bridge, 93 years old, which figures in the famous cases before the Supreme Court of the United States (R. 7) *Pennsylvania* v. *Wheeling & Belmont Bridge Company* (1851), 13 How. 518, 14 L. Ed. 249 and *Pennsylvania* v. *Wheeling & Belmont Bridge Company* (1855), 59 U. S. (18 How.) 421, 15 L. Ed. 435.

The 1935 Amendment contains a detailed and comprehensive mechanism for rate-making and providing for a specified course of appeal.

Congress, by this series of Acts, has made manifest its intention to exercise the constitutional powers granted under the Commerce Clause to the very limit. It first took supervision over merely the construction of bridges and the exclusive authority of the Secretary of War in that respect is not now debatable; in 1906 it extended that authority to the rates of toll bridges (which authority is no different in origin or essence than the authority already possessed and exercised by the Secretary of War) and it gradually extended the authority by the 1930 and 1935 amendments to cover practically all toll bridges in the United States over navigable streams. The General Bridge Act of 1906 and its two amendments have not been interpreted by this Court, though the cases arising under the General Bridge Act and its two Amendments proceed in Federal Courts and State jurisdictions on the basis of undoubted plenary Federal power both in the construction of the bridges as well as over rates.

Decisions in Cases; Authorities where the Secretary of War has taken Jurisdiction of Tolls under the General Bridge Act; showing also the Application of the General Bridge Act to Tolls

The jurisdiction of the Secretary of War under the General Bridge Act has been exercised and enforced. *Clarksburg-Columbus Short Route Bridge Co.* v. *Woodring* (1937) 89 F. (2d) 788; Reversed on other grounds (1938) 302 U. S. 658. The two bridges concerned span the Ohio, south of Wheeling, and were found by the Court to be "* * * Subject to the lawful orders of the Secretary of War prescribing toll rates under the Act of Congress of March 23,

1906 * * *" The case turned upon the methods employed by the Secretary of War in fixing the rates of toll. *Omaha Packing Company* v. *Pittsburgh F. W. & C. Ry. Co.* (1941) 120 F. (2d) 594, C. C. A. 7th. (The Court decided that the General Bridge Act was paramount to state authority exercised through ordinances of the City of Chicago.) *U. S.* v. *Columbia River-Longview Bridge Co.* (1938) 99 F. (2d) 287 (involving an interpretation of the General Bridge Act in respect to tolls to be paid for troops and munitions of the United States. *Gouax* v. *Boray* (1939) 105 F. (2d) 256; Cert. denied 308 U. S. 607 to the same effect. (Refund of bridge tolls for troops and vehicle movements. General Bridge Act applied.) *Bellaire, Benwood & Wheeling Ferry Co.* v. *Interstate Bridge* (1930) 40 F. (2d) 323. Cert. Den. (Paramount authority of the General Bridge Act over state authority applied to a competing bridge four miles from those of the instant case.) *People* v. *Hudson River Connecting R. R. Corp.* (1920) 228 N. Y. 204 (decided that the General Bridge Act of 1906 was an exercise of Congress' plenary power over interstate commerce and excluded any further action by a state; a conflicting New York statute struck down.) *Detroit International Bridge Co.* v. *American Seed Co.* (1930) 249 Mich. 289. (Supremacy of General Bridge Act of 1906 over State authority decided.)

Many of the bridges of the United States are actually operating under the direction of the Secretary of War, among them being a bridge within four miles of those in question. There are twenty-two interstate bridges over the Ohio River connecting the shores of West Virginia and those of Ohio or Kentucky (R. 11). Federal jurisdiction has been recognized as to a number (R. 11). The practical reasons for the exclusive policy of the Commerce Clause is demonstrated in this case when the State Road

Commission of West Virginia tries to control the rates of certain bridges in the same area where the rates of other bridges are actually controlled by the Secretary of War.

IV.

The West Virginia Act of the Legislature under which the State Road Commission of West Virginia purported to act recognizes the paramount authority of the Federal Government as respects tolls.

The Act of the Legislature of West Virginia under which the State Road Commission purported to act, so far as relevant, provides (Official West Virginia Code, Chapter 17, Article 17, Section 22, Serial § 1681).

> "Tolls shall be fixed, charged and collected for transit over such bridges * * * subject, however, to any applicable law or regulation of the United States of America now in force or hereafter to be enacted or made * * *."

(For the complete section see appendix p. 26.)

In the case of *Miller* v. *Huntington & Ohio Bridge Co.* (1941) 123 W. Va. 320, 15 S. E. (2d) 687, the Supreme Court of Appeals of West Virginia recognized (in a casual manner, however) that the tolls of the Huntington Bridge were under control of the Secretary of War.

The Supreme Court of Appeals of West Virginia in another (and kindred case) sustained its jurisdiction upon three grounds (copy of opinion, appendix to brief, p. 25).

First. That "no specific legislation pertaining to the subject matter has been enacted by the Congress".

Second. That "no regulatory action has been taken by the Interstate Commerce Commission or the Secretary of War".

Third. The matters involved are merely local.

Citing Public Service Commission v. *Harpers Ferry Bridge Co.* (1933) 114 W. Va. 291, 171 S. E. 760; *Missouri P. R. Co.* v. *Larabee Flour Mills Co.* (1909) 211 U. S. 612; *Northwestern Bell Tel. Co.* v. *Nebraska State Ry. Comm.* (1936) 297 U. S. 471.

Certainly the General Bridge Act of 1906 and its two amendments are as specific as language makes possible, and which, we respectfully urge, manifests the intention of the Congress to exercise control over tolls of bridges over navigable streams. Implicit in the above objection is the erroneous belief that until Congress acts, the states are free to regulate *directly* interstate commerce so far as the rates of toll of bridges over navigable streams are concerned.

The General Bridge Act of 1906 and its two amendments nowhere make its operation conditional on permissive action by the Secretary of War. Legislation does not depend upon the action or non-action of specific officials. The question was discussed in *Oregon & Washington R. Co.* v. *Washington* (1926) 270 U. S. 87, 46 Sup. Ct. 279, where the objection was raised as to the non-action of the Secretary of Agriculture to establish a quarantine under the Interstate Commerce Act and the Court holding that Congress by affirmative legislation had occupied the field of regulating commerce and so necessarily had excluded state action. The Secretary of War has in fact taken action under the General Bridge Act of 1906 and its Amendments, as appears from cases previously cited pp. 18-19).

The State of West Virginia has no extra-territorial jurisdiction. The bridges in question lie in two states. The State of Ohio manifestly would have the same right as West Virginia to prescribe tolls which demonstrates that neither state has the right. The police power of a state

cannot extend beyond its own borders. Within its borders, the police power of a state must be relevant to health, morals, public safety, and convenience, and such regulations can incidentally and indirectly (but never directly) affect interstate commerce. *Public Utilities Commission* v. *Attleboro* (1926) 273 U. S. 83.

The cases cited in the order of the Court below, do not sustain the reasons advanced.

Public Service Commission v. *Harpers Ferry Bridge Co.* (1933) 114 W. Va. 291, 171 S. E. 760. The authority of the Public Service Commission of West Virginia to regulate the rates of toll of the bridge over the Potomac at Harpers Ferry, connecting West Virginia and Maryland, was upheld. The Court commented that the Potomac did not appear to be navigable at Harpers Ferry, which fact is necessary for Federal jurisdiction. The General Bridge Act was not discussed, counsel agreeing that no Federal question was involved. None of the questions in the instant case were before the West Virginia court in the above case.

Missouri P. R. Co. v. *Larabee Flour Mills Co.* (1908) 211 U. S. 612. A state law required an interstate railroad carrier to treat all shippers alike, which was held to be within state power and conducive to the welfare and convenience of citizens of Kansas. The delegation of certain national powers to the Interstate Commerce Commission was not the equivalent of specific action of Congress in respect to the particular matters involved. The field wherein the state of Kansas acted was common law and not covered by the Interstate Commerce Act.

Northwestern Bell Tel. Co. v. *Nebraska State Ry. Comm.* (1936), 297 U. S. 471. This court held that "both the language of the statute (Interstate Commerce Act) and the

nature of its subject-matter, indicates that it contemplated no restriction of state control over depreciation rates until the United States Commerce Commission had presented its own rates".

None of these cases touch the question of state power directly to control interstate commerce (a field entirely withdrawn from state action) whether or not the Congress has acted.

Original Action for Writ of Prohibition in the Supreme Court of Appeals of West Virginia Proper.

The Supreme Court of Appeals of West Virginia is given original jurisdiction in cases of prohibition by Article 8, Section 3 of the Constitution of West Virginia, and by Chapter 51, Article 1, Section 3 of the Official Code of West Virginia. It is likewise held in West Virginia that the fixing of rates is quasi-judicial and the public body so doing is subject to the writ of prohibition to correct an excess of jurisdiction. *Huntington Chamber of Commerce* v. *Public Service Commission* (1919), 84 W. Va. 81, 99 S. E. 285.

The obstruction to the free flow of interstate commerce seems apparent; the increase of rates of toll one hundred and fifty per cent (150%) introduces serious consideration as regards the fares of the petitioners. Former patrons of the bridges now travel from the Island to the east shore of the Ohio River and return toll free, and what they formerly paid in tolls is now transferred and exacted from interstate traffic. Traffic intra the state of West Virginia is now toll free and its cost is cast wholly upon the interstate users. Moreover the burden among interstate users is shifted, as the alterations in classifications show, to those users of the bridges whose rates are fixed by national authorities, and hence affect thousands of people indirectly who must use public conveyances. The possibilities for

further juggling of the burdens is endless. We firmly believe this cause is one which should receive a determination from this Court, and respectfully submit that the petition for certiorari should be allowed.

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APPENDIX TO BRIEF.

LOVINS, *J.*:

P. S. C. No. 2814.

VILLAGE OF BRIDGEPORT, et al.,

v.

CITY OF WHEELING, a Municipal Corporation, et al.

Upon petition for suspension and review of an order of the Public Service Commission entered in this proceeding on March 4, 1943.

The Court having maturely considered the petition for suspension and review filed herein on the 8th day of March, 1943, the papers, documents and record which were before the Public Service Commission at the hearing which resulted in the entry of the order complained of; the briefs and oral arguments of counsel in behalf of complainants and defendants, is of opinion that the subject matter of the regulation made by the order of the Commission entered on March 4, 1943, is local in character, that no specific legislation pertaining thereto has been enacted by the Congress, and that no regulatory action has been taken by the Interstate Commerce Commission or Secretary of War. *Public Service Commission* v. *Bridge Co.*, 114 W. Va. 291, 171 S. E. 760 (certiorari denied 292 U. S. 624, 54 S. Ct. 628); *Missouri P. R. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 29 S. Ct. 214; *Northwestern Bell Tel. Co.* v. *Nebraska State Ry. Comm.*, 297 U. S. 471, 56 S. Ct. 536, and that petitioner has not shown that it is entitled to the relief prayed for.

It is therefore considered by the Court that the suspending order prayed for in this case be, and the same is hereby denied, and that the petition be and the same is hereby dismissed.

It is further ordered that leave be, and the same is hereby granted to the Public Service Commission to withdraw from the Office of the Clerk of this Court, all papers, documents and records, or certified copies thereof, filed herein pursuant to law.

Chapter 17, Article 17, Section 22, Serial § 1681

Tolls to be Charged; Intrastate and Interstate Bridges; Purchase of Existing Bridges; Disposition of Tolls.

Tolls shall be fixed, charged and collected for transit over such bridges and shall be so fixed and adjusted, in respect of the aggregate of tolls from the bridge or bridges for which a single issue of bonds is issued, as to provide a fund sufficient to pay the principal and interest of such issue of bonds and to provide an additional fund to pay the cost of maintaining, repairing and operating such bridge or bridges, subject, however, to any applicable law or regulation of the United States of America now in force or hereafter to be enacted or made. Two or more bridges may be included in one issue of bonds, and intrastate and interstate bridges may be grouped in the same issue; Provided, That no existing bridge or bridges shall be acquired by purchase, eminent domain, or otherwise, unless the state road commissioner shall have determined that the income therefrom, based upon the toll receipts for the next preceding fiscal or calendar year, will be sufficient to pay all expenses of operating and maintaining such bridge, in addition to the interest and sinking fund requirements of the bonds to be issued to pay the purchase price thereof. The tolls from the bridge or bridges for which a single issue of bonds is issued, except such part thereof as may be necessary to pay such cost of maintaining, repairing and operating during any period in which such cost is not otherwise provided for (during which period the tolls may be reduced accordingly) shall be transmitted each month to the state sinking fund commission and by it placed in a special fund which is hereby pledged to and charged with the payment of the principal of such bonds and the interest thereon, and to the redemption or repurchase of such bonds, such special fund to be a fund for all such bonds without distinction or priority of one over another. The moneys in such special fund, less a reserve for payment of interest, if not used by the sinking fund commission within a reasonable time for the purchase of bonds for cancellation at a price not exceeding the market price and not exceeding the redemption price, shall be applied to the redemption of bonds by lot at the redemption

price then applicable. (1929. c. 8 §10; 1931 c. 44; 1939 c. 113)

Constitution of West Virginia, Art. VIII, Sec. 3

It shall have original jurisdiction in cases of habeas corpus, mandamus, and prohibition. It shall have appellate jurisdiction in civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars; in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee or curator; or concerning a mill, road, way, ferry or landing; or the right of a corporation or county to levy tolls or taxes; and, also, in cases of quo warranto, habeas corpus, mandamus, certiorari and prohibition, and in cases involving freedom or the constitutionality of a law.